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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JORGE ACOSTA NUNEZ, Defendant and Appellant.	F034692 (Super. Ct. No. 42067) **OPINION**

APPEAL from a judgment of the Superior Court of Tulare County. Paul A. Vortmann, Judge.

Janet J. Gray, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Robert R. Anderson, Chief Assistant Attorney General, J. Robert Jibson and Janine R. Busch, Deputy Attorneys General, for Plaintiff and Respondent.

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PROCEDURAL HISTORY

By information, defendant was charged with two counts of attempted willful, deliberate, premeditated murder (counts 1 & 2; Pen. Code,[1] § § 664/187), and assault with a deadly weapon, a knife (count 3; § 245, subd. (a)). It was alleged as to counts 1 and 2 that defendant had discharged a firearm and caused great bodily injury within the meaning of section 12022.53, subdivisions (c), (d), and (e).[2]

By jury trial, defendant was convicted of counts 1 and 3, and acquitted on count 2. The jury found true the allegations that defendant premeditated the attempted murder and inflicted great bodily injury with a firearm in count 1**,** and used a knife in count 3.

Probation was denied and defendant was sentenced to prison for life on count 1, a consecutive term of 25 years to life for the great bodily injury inflicted with a firearm, and a consecutive determinate term of three years on count 3, assault with a knife.

FACTUAL HISTORY

At about 4:00 p.m. on May 20, 1999, Armando "Cacho" Cedillo was walking with his girlfriend, Jackie Rodriguez, near the Super 7 Market in Orosi. As they walked on Road 128 near a ditch, they met Cedillo's friend, Ross Aldape. Cedillo was a member of the Norteño gang, and had a prison gang marking on a cast. Aldape was wearing a red jersey, a color associated with the Norteño gang. Shortly after, four males, including defendant, a Sureño gang member from San Jose, surrounded the trio and accused Cedillo of stabbing one of their friends. Cedillo replied that he had not stabbed anyone and threw away a bar he had picked up for protection. Eight other people wearing blue,

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1 All statutory references are to the Penal Code unless otherwise noted.

2 It was further alleged defendant had served three prior prison terms within the meaning of section 667.5, subdivision (b), but these allegations were subsequently dismissed on the prosecutor's motion.

the Sureño gang color, then also surrounded Cedillo, Aldape and Rodriguez. Cedillo told Aldape to call somebody for help.

As Aldape backed away, defendant followed him. Defendant confronted Aldape, who responded that he did not want any problems. Defendant reached into his pocket to pull out a knife and Aldape ran off, observing defendant running after him with a knife. As defendant got closer and appeared ready to stab him, Aldape picked up a piece of a fishing pole and began swinging it at defendant. Aldape then saw two or three of defendant's friends coming toward him with knives and rocks, so he turned and began running again. At this point, an off-duty sheriff's officer stopped and began to chase the Sureño gang members, who dispersed. Defendant told Cedillo he was going to kill him before he and his friends ran away. The officer then checked to see if Cedillo and Rodriguez were all right.

On May 22, 1999, Cedillo and his friend, Salvador Lua, attended a baptism party at the home of Lua's uncle. Cedillo saw defendant at the party, but there were no problems, and Cedillo left around 11:00 p.m. Cedillo went home, and Lua came over later and invited him to drink beer. The pair began walking to Lua's house, but stopped so that Lua could urinate in a parking lot by the Midway Market. In the meantime, Cedillo decided to use a nearby pay phone. As he dialed, Cedillo heard a man call his nickname, Cacho. Cedillo hung up and walked toward the man.

At this point, Lua met him on the street. Cedillo recognized as defendant the man who called him, and told Lua this was the man "that jumped me." Lua responded, " 'Well, go beat him up.' " Lua kept walking, and Cedillo continued to approach defendant, who was standing in the parking lot of the Torres Bakery. Cedillo saw defendant pull something out of his pocket, and he slowed down. Defendant made some kind of cocking motion, and Cedillo stopped when he saw that defendant was holding a chrome handgun. Defendant then shot and struck Cedillo two or three times before Cedillo could turn around and run. When Cedillo turned, he was struck in the back of his

leg. He then ran toward an ice machine at the Midway Market and took cover behind it. Defendant left laughing, and Cedillo dialed 911 on the pay phone. Cedillo was shot in the hand, stomach, and leg, and was in the hospital for four days.

Meanwhile, Lua ran when he heard the gunshots. Lua believed one shot was fired in his direction.

On October 20, 1999, George Lua, Salvador's 13-year-old brother, testified that six or seven months earlier defendant had tried to get him to join the Sureño gang. The next day, defendant showed George a blue shirt with a low rider truck on it. George declined defendant's invitation.

Mikael Niehoff, a San Jose Police Department detective, testified as a gang expert. He opined that a gang member who is recruiting gang members would challenge others and engage in fights to gain notoriety, in order to aid in the recruitment process. Gang members also commit crimes to obtain recognition and respect.

Defense

Defendant testified that he was a former gang member in San Jose, but was not associated with any gang at the time of the crimes. On May 20, 1999, he and his friends were walking when Cedillo began yelling at them from across the street. Defendant and his friends went over to see what was going on. Cedillo picked up a rock and defendant took out a pocketknife. Rodriguez got between Cedillo and defendant and told them not to fight. Defendant then put the knife away and left when the off-duty officer showed up. Defendant, whose nickname was "Cat," denied ever seeing Aldape, chasing him, or attempting to stab him.

On the early morning of May 23, 1999, defendant was walking past the Torres Bakery because he was locked out of his temporary residence. He heard someone say, "'Cat, we're gonna kill you now.'" As he walked, Cedillo and Lua were coming at him. Cedillo had a knife and came within eight feet of defendant. Defendant withdrew a .25-

caliber handgun from his pocket and shot at Cedillo three times. He did not fire the gun at Lua, who ran when the shots were fired.

Defendant admitted having been convicted of transporting or selling cocaine and heroin in 1991 and 1993. He denied ever seeing George Lua or soliciting him to join a gang.

DISCUSSION

I. Substantial evidence analysis

Defendant contends the court erred by denying his section 1118.1 motion to dismiss the allegations that the attempted murder was premeditated and deliberated, arguing there is insufficient evidence. We reject this contention.

The standard applied by a trial court in ruling on a section 1118.1 motion is the same as that applied by the appellate court in reviewing the sufficiency of the evidence to support a conviction. (*People v. Ainsworth* (1988) 45 Cal.3d 984, 1022.)

> "In reviewing the sufficiency of the evidence, we draw all reasonable inferences in favor of the verdict and view the evidence in the light most favorable to the prosecution, and we uphold the judgment if any rational jury could have found the crime established beyond a reasonable doubt. [Citation.] Our Supreme Court has identified three categories of evidence which might sustain a finding of premeditated murder: (1) facts about a defendant's behavior that show prior planning of the killing; (2) facts about any prior relationship or conduct with the victim from which the jury could infer motive; and (3) facts about the manner of the killing from which the jury could infer the defendant intentionally killed the victim according to a preconceived plan. (*People v. Anderson* (1968) 70 Cal.2d 15, 26 ….) A verdict will be upheld when there is extremely strong evidence of planning; or evidence of motive in conjunction with either (a) evidence of planning or (b) evidence of a manner of killing showing a preconceived design. [Citations.]" (*People v. Brito* (1991) 232 Cal.App.3d 316, 323.)

The categories identified in *People v. Anderson* (1968) 70 Cal.2d 15 are not an exhaustive list, nor does *Anderson* require these factors be present in some special combination or that they be accorded a particular weight. Instead, "*Anderson* was simply intended to guide an appellate court's assessment whether the evidence supports an inference that the killing occurred as the result of preexisting reflection rather than

unconsidered or rash impulse." (*People v. Pride* (1992) 3 Cal.4th 195, 247; *People v. Perez* (1992) 2 Cal.4th 1117, 1125.)

The facts relevant to the attempted murder of Cedillo support a positive finding regarding all three *Anderson* factors. There was some evidence of planning by defendant because he called Cedillo, who was in the process of making a telephone call and unaware of defendant's presence. In addition, defendant was armed with a handgun, which suggests he contemplated using deadly force prior to contacting Cedillo while Cedillo was unarmed. (*People v. Wright* (1985) 39 Cal.3d 576, 593, fn. 5 [defendant obtained a loaded weapon before seeking out victim]; *People v. Alcala* (1984) 36 Cal.3d 604, 626 ["when one … brings along a deadly weapon which he subsequently employs, it is reasonable to infer that he considered the possibility of homicide from the outset"]; *People v. Haskett* (1982) 30 Cal.3d 841, 850 [obtaining a kitchen knife after entering the residence but before the killings was evidence of planning].) Defendant also told Cedillo, three days earlier, that he was going to kill him.

There was also evidence of motive. Cedillo and defendant were members of rival gangs that had a history of violence against each other. In addition, defendant and Cedillo had a confrontation only three days earlier in which defendant wielded a knife, and Cedillo held a rock, thereby showing disrespect toward defendant in front of numerous other members of defendant's gang. In *People v. Bloyd* (1987) 43 Cal.3d 333, the defendant lived with his victim. On the night the victim was killed, defendant and the victim were arguing and "they 'cussed' at each other primarily 'over the kid.'" (*Id*. at p. 342.) The court held this was sufficient to support a finding that the defendant was motivated to kill because of anger. (*Id*. at p. 348.) Similarly, in this case the court correctly concluded the jury could infer that defendant was angry with Cedillo, perhaps as a result of the earlier confrontation. Thus there was "a 'prior' relationship between defendant and the victim from which the jury could draw an inference of motive." (*People v. Wright, supra,* 39 Cal.3d at p. 593, fn. 6; see also *People v. Miranda* (1987) 44

Cal.3d 57, 87 [anger as motive sufficient where defendant testified he became angry over victim's repeated refusal to sell him beer after 2:00 a.m.]; *People v. Arcega* (1982) 32 Cal.3d 504, 519 [defendant motivated to kill because he felt anger and frustration by what he perceived as victim's unfair and cruel treatment of him].) As stated in *People v. Lunafelix* (1985) 168 Cal.App.3d 97, 102, "the law does not require that a first degree murderer have a 'rational' motive for killing. Anger at the way the victim talked to him . . . may be sufficient . . . ." (See *People v. Proctor* (1992) 4 Cal.4th 499, 529 [motive not clear].) "[T]he incomprehensibility of the motive does not mean that the jury could not reasonably infer that the defendant entertained and acted on it [Citation.]." (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1238.)

In addition to the personal animosity between defendant and Cedillo, there was other evidence of motive. In particular, the evidence supported theories that (1) because defendant was new to the area, he needed to prove himself, and (2) his crimes would aid his efforts in recruiting new gang members. As noted earlier, Cedillo was a member of a rival gang. "A studied hatred and enmity, including a preplanned, purposeful resolve to shoot anyone in a certain neighborhood wearing a certain color, evidences the most cold-blooded, most calculated, most culpable, kind of premeditation and deliberation." (*People v. Rand* (1995) 37 Cal.App.4th 999, 1001; *People v. Francisco* (1994) 22 Cal.App.4th 1180, 1192 [shooting at rival gang member is evidence of motive]; *People v. Wells* (1988) 199 Cal.App.3d 535, 542 [same].)

Finally, the manner of the attempted killing evidences premeditation and deliberation. Defendant shot at Cedillo without warning. He fired more than one shot at close range, and continued firing even after Cedillo turned and ran away. (See *People v. Francisco*, *supra*, 22 Cal.App.4th at p. 1192 [multiple gunshots at close range could give rise to inference that the shooter was intent on inflicting death and therefore indicative of premeditation and deliberation]; *People v. Bolin* (1998) 18 Cal.4th 297, 332 [same].) After shooting Cedillo, defendant laughed before fleeing the scene.

In sum, we conclude there was more than sufficient evidence to permit a rational trier of fact to find premeditation and deliberation beyond a reasonable doubt on count 1. Therefore the court did not err by denying defendant's motion to dismiss these allegations.

II. Alleged discovery violations

Defendant contends his right to timely discovery under section 1054.1 and his constitutional right to due process were violated, and that the court abused its discretion by failing to protect these rights. Specifically, defendant asserts the disclosure of prosecution witnesses George Lua and expert witness Mikael Niehoff was impermissibly late. Defendant contends the court's refusal to grant a continuance to effectively reduce the prejudice from the untimely discovery violated his rights to due process and to be represented by prepared counsel. Respondent argues there was no violation of section 1054.1, no due process violation, and the court properly permitted the testimony of both witnesses. We agree.

A. The law

Discovery in criminal cases is governed by section 1054 et seq. (§§ 1054, subd. (c); 1054.5, subd. (a).)[3] "The purpose of section 1054 et seq. is to promote ascertainment

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[3] Section 1054.1 provides:

> "The prosecuting attorney shall disclose to the defendant or his or her attorney all of the following materials and information, if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies: [¶] (a) The names and addresses of persons the prosecutor intends to call as witnesses at trial. [¶] … [¶] (c) All relevant real evidence seized or obtained as a part of the investigation of the offenses charged. [¶] … [¶] (f) Relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial, including any reports or statements of experts made in conjunction with the case, including the

of truth by liberal discovery rules which allow parties to obtain information in order to prepare their cases and reduce the chance of surprise at trial. [Citation.]" (*People v. Jackson* (1993) 15 Cal.App.4th 1197, 1201.)

Absent circumstances not relevant here, disclosure must be made at least 30 days before trial or, if the information comes into possession of the prosecutor within 30 days of trial, immediately. (§ 1054.7.) Upon a showing that a party has not complied with section 1054.1 and that the moving party has complied with informal discovery procedures, section 1054.5, subdivision (b) provides:

> "[A] court may make any order necessary to enforce the provisions of this chapter, including, but not limited to, immediate disclosure, contempt proceedings, delaying or prohibiting the testimony of a witness or the presentation of real evidence, continuance of the matter, or any other lawful order. Further, the court may advise the jury of any failure or refusal to disclose and of any untimely disclosure."

The court may prohibit the testimony of a witness "only if all other sanctions have been exhausted." (§ 1054.5, subd. (c).)

A trial court has discretion to decide what sanction to impose for violation of a discovery order. (*People v. Wimberly* (1992) 5 Cal.App.4th 773, 792.) Sanctions are generally imposed when the information is readily available but there is a deliberate failure to disclose. (See *People v. Santos* (1994) 30 Cal.App.4th 169, 178.) "[D]iscretion is abused whenever the court exceeds the bounds of reason, all of the circumstances being considered. [Citations.]" (*People v. Giminez* (1975) 14 Cal.3d 68, 72.)

B. Witness George Lua

In this case, the record fails to show the prosecutor intended to call George Lua as a witness prior to the morning he was called to testify. When George was called as a witness in the afternoon, defendant objected and the court held a hearing. Specifically,

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> results of physical or mental examinations, scientific tests, experiments, or comparisons which the prosecutor intends to offer in evidence at the trial."

defense counsel noted she had received word from the prosecutor that George would be a witness that morning, and she had not received any reports regarding his expected testimony. She requested an offer of proof of George's testimony. The prosecutor stated there were no police or investigator reports prepared and he had nothing to give defense counsel. George had been served with a subpoena the night before and he immediately informed defense counsel of his name and address. As an offer of proof, the prosecutor stated George would testify that he was solicited by defendant to join defendant's gang. This testimony was being offered to show motive by defendant for the violent crimes he allegedly committed. Defense counsel then objected under Evidence Code section 352 that the probative value of the testimony was outweighed by its prejudicial impact.

Defense counsel also requested an opportunity for her investigator to speak with the witness, to aid her cross-examination. The prosecutor stated there were numerous references in the police reports and transcripts already in defendant's possession to the effect that defendant was attempting to get people to join his gang. The court then denied the request to make the witness available for defense examination, and denied the Evidence Code section 352 objection. The court found the evidence was probative on the issue of motive. It noted that any prejudicial impact was outweighed, since gang evidence was going to be introduced on other issues, as indicated in both parties' opening statements.

Here, there was no suggestion that any failure to disclose was willful or done to obtain a tactical advantage. (See *People v. Jackson, supra*, 15 Cal.App.4th at p. 1203.) The prosecutor represented he was unaware of George's status as a potential witness until the night before, and the information requested by the defense was not readily available to the prosecution. In fact, George testified he had not told anyone about defendant trying to recruit him, until the evening before his testimony, when an investigator from the district attorney's office spoke with him. The prosecutor's explanation was uncontradicted. (Contrast *Taylor v. Illinois* (1988) 484 U.S. 400 [the witness's testimony

"dramatically contradicted defense counsel's representations to the trial court"].) There is a significant difference between a failure to gather evidence immediately or to find all evidence and a willful failure to comply with discovery orders. (*People v. Hammond* (1994) 22 Cal.App.4th 1611, 1623.) Since the prosecutor informed defendant as soon as he formed the intent to call the witness, there was no discovery rule violation. (§ 1054.7.) Consequently, the court did not abuse its discretion by allowing George to testify without making him available to the defense.

Further, defendant's contention that he was prejudiced is unsupported. Defendant's brief states that the prosecutor's conduct prevented him from formulating a defense to the theory that the crime was motivated by gang recruitment activity. However, the record shows that on October 18, 1999, defendant was aware of the prosecutor's theory but doubted he could present evidence to prove that theory. Beyond this one claim, defendant's general plea that the tardiness of the disclosure was prejudicial does not begin to justify a reversal. (See *People v. Gonzales* (1994) 22 Cal.App.4th 1744, 1747.) Thus, there is nothing upon which we can base an affirmative finding of prejudice sufficient to support a reversal.

C. Expert witness Niehoff

On October 18, 1999, during in limine motions, defendant's attorney stated she had not been provided any notice regarding expert testimony concerning gang association and membership. On that day, the prosecutor provided defense counsel a discovery memo stating Mikael Niehoff, a San Jose Police Department detective, was a possible witness on gang membership. He further informed her there were no police reports prepared.

On October 20, 1999, defense counsel informed the court that the prosecutor had provided her discovery that morning. The prosecutor identified Niehoff as an impeachment witness if defendant denied that he was in a gang. The prosecutor also provided 50 pages of reports concerning incidents that occurred in San Jose, but agreed

he would not use the reports in his case-in-chief. The prosecutor represented that Niehoff would be his expert concerning tattoos on defendant, and he provided discovery to establish Niehoff was an expert in that area.

On October 21, 1999, during examination of Niehoff, the prosecutor asked a hypothetical question, based on George Lua's testimony, as follows:

> "If someone comes into a town who's a gang member and is trying to recruit 13-,14-year-olds into becoming gang members, do those people oftentimes challenge other gangs to fight in order to make a name for himself so people will join his gang?"

Defendant objected and a hearing outside the presence of the jury was held. Defense counsel stated there had been a discovery violation because it was her understanding Niehoff was only going to testify as to gang membership and she had no prior notice that Niehoff would be testifying "regarding possible recruitment." "I'd ask for a continuance to speak to the witness so I can properly cross-examine …." The court found the delay in disclosing Niehoff's identity was justifiable because the prosecutor did not learn the identity of the witness until October 18, 1999, the same day he disclosed it to the defense. The court then recessed to give defense counsel time to obtain legal authority "that when there is a delayed identification, you and your client have a right to interrogate the witness that has been so identified and provide you with that opportunity."

After the recess, counsel relied on *Sanders v. Superior Court*. The court read the case, found that it was not on point, and denied defendant's motion for a continuance.

On appeal, defendant apparently no longer relies on *Sanders,* since it is not cited in his opening or reply brief. Instead, he principally relies on our opinion in *People v. Gonzales, supra,* 22 Cal.App.4th at page 1744. However, *Gonzales* supports rather than defeats the court's finding of no discovery violation in this case. There, we reversed the court's decision to exclude testimony following a midtrial disclosure of a defense witness discovered during the trial, and immediately disclosed to the prosecution. This situation

is the same, except here the prosecutor learned of and immediately disclosed witness Niehoff at the beginning of trial. In *Gonzales* we held:

> "We deal here with a situation of evidence that becomes known after a discovery compliance date and in midtrial.… [T]here is a distinction between having evidence and refusing to disclose, and discovering evidence and disclosing it at a time when it places the other side at a disadvantage. Further, we perceive as a relevant consideration in determining willfulness that evidence has been or would have been so readily discovered or available that an explanation that it was unknown may well be suspect and be viewed as simply an effort to circumvent discovery requirements.
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> "With these principles in mind, we turn to the facts before us. The record does not demonstrate that the court made any finding that the failure to disclose was willful. Nor can we infer such a finding because the present record does not support it. There is no determination of irremediable prejudice or significant prejudice. While the prosecution witnesses had been excused, there is nothing in the record to support the conclusion that those witnesses were unavailable or could not be obtained without significant delay. Therefore, if the sanction of exclusion was imposed because of prejudice, we find no basis to support the course of action taken. If the sanction of exclusion was taken as punishment for failure to comply with discovery orders, we find neither a showing of significant prejudice nor a record supportive of a finding of willfulness." (*People v. Gonzales, supra,* 22 Cal.App.4th at pp. 1758-1759.)

Contrary to defendant's position, the record supports the court's finding that there was no discovery violation on the part of the prosecutor for disclosing witness Niehoff after the 30-day discovery cutoff. As noted earlier, in situations where the party learns of the witness after the discovery cutoff date, disclosure is required immediately. (§ 1054.7.) The prosecutor complied with this requirement.

Also contrary to defendant's suggestion, the record fails to support a finding the prosecutor acted willfully in an effort to sandbag the defense or to circumvent the discovery requirements. (*People v. Gonzales, supra,* 22 Cal.App.4th at pp. 1758-1759.) "To establish on appeal a violation of section 1054.1, subdivision (a), in failing to disclose a witness, the record must affirmatively demonstrate that a specific witness or witnesses were known to and intended to be called by the prosecutor, but were

undisclosed to the defense as required by the discovery chapter." (*People v. Tillis* (1998) 18 Cal.4th 284, 292.) Here, the record supports the court's contrary finding. "Appellate courts should not engage in speculation about witnesses whose identity or existence is not demonstrated on the face of the record, as any other conclusion threatens to invade counsel's discretion whether to call a witness." (*Ibid*.)

Nor is this case similar to *State v. Clarke* (Or.App. 1991) 808 P.2d 92, also relied on by defendant. There, the defense disclosed the name of a witness but not the address where the witness could be found. Although the defendant did not know the address of the witness, the record established he could easily have discovered the address. (*Id*. at p. 93.) Here, defendant does not argue he was prejudiced by the failure of the prosecutor to provide a means by which the defense could communicate with Niehoff.

The last issue is whether the court abused its discretion by failing to grant defendant a continuance to prepare for cross-examination of Niehoff on the hypothetical question regarding gang recruitment. Defendant was aware Niehoff was going to testify as an expert witness on gangs, specifically regarding defendant's tattoos and their connection to his status as a gang member. Defendant cites no case for the proposition that he was entitled to a continuance to prepare for a slight deviation regarding expert testimony. On this basis alone, his contention is rejected. In any event, defendant fails to establish he is entitled to reversal on appeal.

> "The granting or denial of a motion for a continuance in the midst of a trial traditionally rests within the sound discretion of the trial judge who must consider not only the benefit which the moving party anticipates but also the likelihood that such benefit will result, the burden on other witnesses, jurors and the court and, above all, whether substantial justice will be accomplished or defeated by a granting of the motion. In the lack of a showing of an abuse of discretion or of prejudice to the defendant, a denial of his motion for a continuance cannot result in a reversal of a judgment of conviction." (*People v. Laursen* (1972) 8 Cal.3d 192, 204; *People v. Fudge* (1994) 7 Cal.4th 1075, 1105; *People v. Zapien* (1993) 4 Cal.4th 929, 972; *People v. Howard* (1992) 1 Cal. 4th 1132, 1171.)

The court did not abuse its discretion by denying a midtrial continuance to allow defense counsel to interview Niehoff or George Lua. Defense counsel was fully aware the case was a gang case. She was also aware one theory was that defendant committed the crimes to aid his recruitment of others to join his gang. Although defense counsel was skeptical about the ability of the prosecutor to find evidence to support this theory, she was clearly aware of it. The fact defense counsel was surprised by the prosecutor's hypothetical question does not mean she should not have reasonably anticipated it.

Finally, defendant's contention that he was prejudiced is unsupported. The record does not show whether defense counsel attempted to interview Niehoff prior to or after his testimony. Niehoff was subject to recall by defendant but was never recalled. Even as late as December 23, 1999, when defendant could have presented a motion for new trial based on newly discovered evidence, nothing was presented to show prejudice. Similarly on appeal, defendant fails to show how he was prejudiced. Consequently, a denial of his motion for a continuance cannot result in a reversal of a judgment of conviction. (*People v. Laursen*, *supra*, 8 Cal.3d at p. 204.)

D. Due process

In a related argument, defendant maintains the failure to reveal the witnesses earlier deprived him of due process. However, as noted above, defense counsel had an opportunity to interview both witnesses prior to the conclusion of trial and chose not to recall either witness. Defendant was not deprived of an ability to present a defense. He testified he had never seen George Lua, was not a member of a gang, was not a gang recruiter, and had acted in self-defense. Therefore, there is no denial of due process.

III. Gang evidence exclusion

Defendant contends the court abused its discretion by admitting evidence regarding gang affiliation, membership, and conduct. Specifically, defendant refers to the testimony of Niehoff and George Lua. Defendant claimed he acted in self-defense, and thus his motive at the time of the shooting was highly relevant. Consequently, its

probative value was not substantially outweighed by the probability that its admission would create a substantial danger of undue prejudice. (Evid. Code, § 352; *People v. Sandoval* (1992) 4 Cal.4th 155, 175; *People v. Maestas* (1993) 20 Cal.App.4th 1482, 1497 ["California courts have long recognized the potentially prejudicial effect of gang membership evidence [but] have admitted such evidence when the very reason for the crime, usually murder, is gang related"].)

"Cases have repeatedly held that it is proper to introduce evidence of gang affiliation and activity where such evidence is relevant to an issue of motive or intent." (*People v. Funes* (1994) 23 Cal.App.4th 1506, 1518; see *People v. Woods* (1991) 226 Cal.App.3d 1037, 1054; *People v. Burns* (1987) 196 Cal.App.3d 1440, 1456; *People v. Harris* (1985) 175 Cal.App.3d 944, 957; *People v. Frausto* (1982) 135 Cal.App.3d 129, 140.) Further, in *People v. Gardeley* (1996) 14 Cal.4th 605, 617, the California Supreme Court held the culture and habits of criminal street gangs meets the criteria under Evidence Code section 801 for expert opinion. In addition, *Gardeley* held that a gang expert's opinion based on a hypothetical situation is proper. "Generally, an expert may render opinion testimony on the basis of facts given 'in a hypothetical question that asks the expert to assume their truth.'" (*Gardeley, supra,* at p. 618.) It is clear the court did not abuse its discretion by permitting Niehoff to give his expert opinion based on the hypothetical question, since it was rooted in facts shown by the evidence -- George Lua's testimony. (*Id*. at pp. 618-620.)

Gang evidence was admissible to show the jury why 12 armed men all wearing blue surrounded Cedillo, a gang member, and Aldape, who was wearing red, during the first altercation. Cedillo had been wearing a cast with a prison gang name on it. Further, any potential prejudice to defendant was offset by the fact the victim was also a gang member. This fact was used affirmatively by defendant to support the defense theory that Cedillo, a gang member, was attacking him when he acted in self-defense. In conclusion,

the court did not abuse its discretion under Evidence Code section 352 by admitting gang evidence.

IV. Detective Niehoff's expert qualifications

Defendant argues the court erred by finding Niehoff was qualified to testify as an expert witness on gang activity. This contention is also without merit.

As noted earlier, in *People v. Gardeley*, *supra*, 14 Cal.4th at page 617, the California Supreme Court held the culture and habits of criminal street gangs meets the criteria under Evidence Code section 801 for expert opinion. Further, the court's determination of whether a witness qualifies as an expert is a matter of discretion and will not be disturbed absent a showing of manifest abuse. (*People v. Bolin, supra,* 18 Cal.4th at pp. 321-322.)

The prosecution presented San Jose Police Detective Mikael Niehoff as a gang expert. Niehoff had qualified as an expert at least 40 to 50 times in San Jose courts. Niehoff acknowledged the dynamics of gangs sometimes vary in different locations. However, he testified that gang activities are fairly uniform throughout the state. After attending the police academy in 1986, Niehoff worked patrol for almost six years in the most gang-infested areas of the city before going into the gang detail. He then became a gang detective for two and one-half years, handling 200 to 250 gang-related cases. He was the initiating officer in a gang abatement program that used civil actions to combat gangs. Niehoff left the gang detail in 1993 and returned to patrol, which included working the gang-infested parts of town and interacting with gang members. He continued his expertise in gangs, talking to gang detectives who had taken his position within the agency. At the time of trial, Niehoff was working Asian-based gangs involved in theft in the high tech industry. He noted: "My training and expertise is continuing to increase, I guess, in all areas." Niehoff last testified as an expert in 1995, and had never worked in Tulare County.

Defendant's objection to Niehoff's qualifications was overruled. "I think it goes to the weight rather than the admissibility of his opinion as an expert."

Contrary to defendant's contention on appeal, the court's ruling was not an abuse of discretion. If an expert has sufficient knowledge of the subject to entitle his or her opinion to go to the jury, the degree of this knowledge goes more to the weight of the evidence than its admissibility. (*People v. Bolin*, *supra*, 18 Cal.4th at p. 322.)

Here, the fact Niehoff had not testified as an expert witness since 1995 did not diminish his knowledge and expertise about street gangs. While Niehoff was no longer in the gang detail, his testimony established his continued involvement in street gang work. Further, Niehoff did not testify to any areas outside his expertise. He discussed the composition of the Norteños and the Sureños, gangs common to the Orosi and San Jose geographic areas, and on gang tattoos. He also testified generally regarding the rivalry between the two gangs and the history of violence. Some of the violence was attributed to committing crimes to gain gang recognition or for a member to make a name for himself within the gang. These crimes would be committed to establish a gang and recruit members. Finally, defendant was a member or former member of a San Jose based gang, and Niehoff's expertise concerned San Jose based gangs.

In conclusion, Niehoff was qualified to testify regarding gang activity. "We have found qualified, as gang experts, officers with investigative experience similar to that of the officer[] here. [Citations.]" (*People v. Williams* (1997) 16 Cal.4th 153, 195.) It was a question for the jury to determine whether his generalized information pertained to this case or had grown stale because gang culture had dramatically changed. There was no abuse of discretion in admitting Niehoff's testimony.

V. Constitutionality of section 12022.53

Defendant contends section 12022.53 does not rationally serve a legitimate state interest because the legislation results in unreasonably disparate punishment of the same offenders whose only difference is their choice of deadly weapon. In addition, defendant

argues that it results in unduly harsh sentences, and imposes irrationally harsh punishment compared to other statutes covering the same conduct. As a result, a prosecutor can dictate sentencing decisions. Defendant concludes the statute violates federal and state principles of substantive due process and equal protection.

The identical contentions were made and rejected in *People v. Perez* (2001) 86 Cal.App.4th 675, as follows:

> "Defendant essentially challenges the wisdom of the law, contending that its harshness makes it irrational. He compares it to many other sentence-enhancing provisions and concludes that its significant increase in the punishment over other enhancements for similar conduct makes the law irrational. A similar argument was rejected regarding the 'Three Strikes' law. (See *People v. Sipe* (1995) 36 Cal.App.4th 468, 482-483 ….) Defendant argues that because the statute deprives the trial court of the ability to adjust unduly severe sentences in accordance with section 1385, it is even more harsh. We acknowledge the Legislature may eliminate a trial court's discretion under section 1385. (*People v. Thomas* (1982) 4 Cal.4th 206, 213-214 …; *People v. Valencia* (1989) 207 Cal.App.3d 1042, 1045 ….) The United States Supreme Court grants legislatures significant latitude in fashioning remedies for perceived societal ills.
>
> "'Normally, the widest discretion is allowed the legislative judgment in determining whether to attack some, rather than all, of the manifestations of the evil aimed at; and normally that judgment is given the benefit of every conceivable circumstance which might suffice to characterize the classification as reasonable rather than arbitrary and invidious.' *(McLaughlin v. Florida* (1964) 379 U.S. 184, 191 …; see also *Truax v. Raich* (1915) 239 U.S. 33, 43 ….)" (*People v. Perez, supra,* 86 Cal.App.4th at p 679.)
>
> We concluded:
>
> "The statute imposes harsher sentences upon individuals who use firearms in the commission of particular violent crimes. Thus, anyone who comes within the parameters of section 12022.53 has demonstrated the same propensity for committing violent crimes and endangering others. The statute further offers different gradations of punishment. Personally using a firearm during the commission of an enumerated crime is punishable by an additional 10 years. (§ 12022.53, subd. (b).) Firing a weapon, indisputably more dangerous to public safety, is punishable with an additional 20 years. (§ 12022.53, subd. (c).) Actually causing great

bodily injury to another, again de facto more dangerous than either possessing it or firing it and injuring no one, earns the felon life in prison with a minimum of 25 years. (§ 12022.53, subd. (d).)

"The statute is rationally related to the intent offered by the Legislature and supports legitimate state interests of citizen safety and deterrence of violent crime. (See, e.g., *People v. Cooper* (1996) 43 Cal.App.4th 815, 828-830 …; People *v. Kilborn* (1996) 41 Cal.App.4th 1325, 1330-1332 …; *People v. Sipe*, *supra*, 36 Cal.App.4th at pp. 483-484.)" (*People v. Perez, supra,* 86 Cal.App.4th at p. 680; see also *People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1215.)

In addition, defendant's equal protection argument was recently rejected in *People v. Alvarez* (2001) 88 Cal.App.4th 1110, which relied on *People v. Martinez* (1999) 76 Cal.App.4th 489, a case upholding section 12022.53 against a claim it results in cruel and unusual punishment. (See also *People v. Gonzales* (2001) 87 Cal.App.4th 1, 18.) *Alvarez* found the distinction between the firearm enhancement under section 12022.53 and less harsh enhancements punishing offenders for using other weapons is justified and does not violate equal protection, reasoning:

"… The provision only applies to certain specified serious felonies committed by use of a firearm, and the length of the sentence is based on the gravity of the harm. The *Martinez* court scrutinized section 12022.53 and concluded that the provision was reasonably written in furtherance of its purpose of deterring gun use in the commission of serious crimes.

"The *Martinez* case is further instructive in addressing the same comparison argument raised in the instant case. In *Martinez* the defendant argued that the provision was unconstitutional based on 'a comparison of the punishment for this offense with the statutory punishment in California for other offenses.' The *Martinez* defendant noted that, 'if he had committed this offense with a knife, rather than a gun, the enhancements for knife use and inflicting great bodily injury would be only four years (§§ 12022, subd. (b), 12022.7, subd. (a)) rather than 25 years to life.' This is, in essence, the basis of defendant's equal protection argument in the instant case, although the *Martinez* defendant complained that such inequity constituted cruel and unusual punishment, rather than violation of equal protection rights.

"The *Martinez* court rejected the defendant's contention, stating that other enhancement provisions, such as section 12022 (committing a felony with a firearm or deadly weapon) and section 12022.7 (infliction of great

bodily harm), 'may not be compared to section 12022.53, because they enhance the sentence for "any felony," whereas section 12022.53 is limited to designated felonies of a very serious type.... More significantly, the Legislature determined in enacting section 12022.53 that the use of firearms in commission of the designated felonies is such a danger that, "substantially longer prison sentences must be imposed ... in order to protect our citizens and to deter violent crime." The ease with which a victim of one of the enumerated felonies could be killed or injured if a firearm is involved clearly supports a legislative distinction treating firearm offenses more harshly than the same crimes committed by other means, in order to deter the use of firearms and save lives.'" (*People v. Alvarez, supra,* 88 Cal.App.4th at 1118, fns. omitted.)

In light of these authorities, we reject defendant's contentions.

DISPOSITION

The judgment is affirmed.

_____
WISEMAN, J.

WE CONCUR:

_____
VARTABEDIAN, Acting P.J.

_____
HARRIS, J.